a

CHAI CHUP SENG REALTY SDN. BHD.

v.

CHOO HUA SANG

b

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-65-1996]
2 APRIL 1997

c

CIVIL PROCEDURE: *Injunction - Mareva injunction - Pending disposal of main suit - Prerequisites for grant of - Whether plaintiff had a valid claim recognised by Court - Whether there was an arguable case - Whether there was danger of removal of assets - Whether inferences could be drawn that defendant would dissipate assets before judgment*

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This was an application to renew a Mareva injunction which the Court had earlier granted to the plaintiff. The defendant was the proprietor *inter alia* of a piece of land known as Lot 2659 which the defendant had charged to Arab-Malaysian Merchant Bank (AMMB). On 19 January 1995 the defendant executed a sale and purchase agreement ('the agreement') with the plaintiff wherefore he undertook to sell Lot 2659 to the latter for RM3.3 million. It

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was the parties' common understanding that the purchase price would be used to redeem the charge afterwhich the defendant would hand over Lot 2659 to the plaintiff free of incumbrances. It turned out, however, that the RM3.3. million was insufficient to meet the liability of the charge, and the result was that the plaintiff was unable to complete its part of the bargain under the

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agreement. Notwithstanding the agreement, and the fact that the plaintiff was ever willing to complete the purchase of Lot 2659, the defendant had the agreement terminated and thereafter sold Lot 2659 to S.J. Host Sdn. Bhd., a company whose paid up capital stood at RM2. Lot 2659, meanwhile, had been sold by way of an auction sale. The plaintiff, having earlier lodged a caveat

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against Lot 2659, sued for specific performance, and pending disposal of the suit applied for a Mareva injunction to restrain the defendant from dealing with his assets. The application was allowed whereby the defendant was restrained, *inter alia*, from (i) receiving any monies due to him in respect of the sale by auction of Lot 2659 (ii) dealing with any of his assets whether situated within or outside Malaysia. In this application to renew the injunction, the defendant

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argued, among other things, that he ought to allowed access to the surplus auction proceeds as he had legitimate debts to pay.

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Held:

[1] A Mareva injunction is in the nature of an interlocutory order designed to prevent a defendant from negating the effect of a judgment which may be entered against him by preventing him from disposing his assets before execution on the judgment can be levied. Its long arm extends to cases where there is a danger of the assets being dissipated either within or out of the Court's jurisdiction.

[1a] A Mareva injunction did not affect a third party's right of set-off against the defendant for liabilities incurred prior to the date of the order. In the context of the present proceedings, the grant of a Mareva injunction to the plaintiff will not affect AMMB's rights *vis-a-vis* the facilities that they have granted to the defendant prior to the date of the order.

[2] There are four prerequisites for the grant of Mareva injunction, namely (i) the plaintiff must have a cause of action which the Court has jurisdiction to hear (ii) there must be a good arguable case (iii) there must be some grounds for believing that the defendant has some assets in his ownership or possession within the jurisdiction and (iv) there must be a real danger that that assets will be removed from or dissipated within the jurisdiction. The fourth factor, however, is the most important element to prove and once there is evidence of the defendant removing the assets from the jurisdiction, the Court will readily grant the injunction.

[3] The plaintiff's claim was based on specific performance of an agreement and damages that flowed from it. It is the law that if a vendor commits a breach of an agreement by refusing to transfer a property to the purchaser, the latter may file a suit for specific performance. Thus, in this case, when the defendant purportedly terminated the agreement and then sought to sell Lot 2659 to S.J. Host Sdn. Bhd., the plaintiff was perfectly entitled to sue for specific performance and apply for a Mareva relief. The plaintiff clearly has a valid cause of action which the Court has jurisdiction to hear.

[3a] The plaintiff also has an arguable case to advance. The caveat lodged by the plaintiff was meant to prevent the defendant from disposing of the property to a third party. That the defendant had the audacity to enter into another sale and purchase agreement of Lot 2659 with S.J. Host Sdn. Bhd. made the whole case arguable. This apart, the absence of a completion date - a situation brought about by the defendant's repeated attempts to extend the date - also pointed to an arguable case.

[3b] It is not disputed that the defendant had assets within the jurisdiction, which included the proceeds of the auction sale. More than that, the precise nature and whereabouts of the defendant's property within jurisdiction had been amply identified by the plaintiff.

[3c] Events showed that in order to frustrate the plaintiff's interest in Lot 2659, the defendant had sold the same to S.J. Host Sdn. Bhd., which was a RM2 company. Taking this into consideration, and the manner in which he wrongfully terminated the agreement, there was no guarantee that the defendant would not sell the properties, or would not enter into a sham deal in order to put the property out of the plaintiff's reach. On the facts, inferences can be drawn that there was a danger that the defendant may dispose of his assets so as to dissipate it before judgment.

[4] The argument that the defendant needed the surplus proceeds to pay his legitimate debts cannot stop the Court from granting a Mareva injunction. However, if the defendant is genuinely interested in paying his legitimate debt, he is free to apply to this Court for a variation of the injunction.

[Application to renew Mareva injunction allowed.]

Cases referred to:

The American Cyanamid [1975] 1 All ER 504 ***(cit)***
Allen v. Jambo Holdings Ltd. [1980] 2 All ER 502 ***(cit)***
Cargill v. Bower [1879] 10 Ch. D 502 ***(cit)***
Seet Soh Ngoh v. Ventkateswara Sdn. Bhd. [1976] 1 MLJ 242 ***(cit)***
Palaniappa Chettiar v. Letchumanan Chettiar & Anor. [1982] 1 MLJ 252 ***(cit)***
Development & Commercial Bank Bhd. v. Government of Malaysia & Ors. [1989] 3 MLJ 359 ***(cit)***
Boonsom Boonyanut v. Adorna Properties Sdn. Bhd. [1990] 3 MLJ 444 ***(cit)***
Johnson v. Yuill [1980] 3 All ER 190 ***(refd)***
Prince Abdul Rahman [1980] 1 WLR 1268 ***(refd)***
Robinson v. Pickering [1881] 16 Ch. D 660 ***(cit)***
Nippon Yussen Kaisha v. Karageorgis [1975] 3 All ER 282 ***(refd)***
Mareva Compania Navierra SA v. International Bulkcarriers SA [1980] 1 All ER 213 ***(refd)***
Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 260 ***(refd)***
Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd. [1984] 2 MLJ 143 ***(cit)***
Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor. [1988] 1 MLJ 97 ***(cit)***
Ballabil Holding v. Hospital Products [1985] 1 NSWLR 155 ***(cit)***
Cretanor Maritime Co. Ltd. v. Irish Marine Management [1978] 3 All ER 164 ***(cit)***
Oceania Castelana Armadora SA v. Mineral Import Export, The Theotokos [1983] 2 All ER 65 ***(cit)***

Rasu Maritime SA v. Perusahaan [1977] 3 All ER 324 ***(refd)***
The Third Chandris [1979] 2 All ER 972 ***(refd)***
The Ninemia [1984] 1 All ER 398 ***(refd)***
Art Trend Limited v. Blue Dolphin (Pte.) Ltd. [1983] 1 MLJ 25 ***(refd)***
Creative Furnishing Sdn. Bhd. v. Wong Koi [1989] 2 MLJ 153 ***(refd)***
The Siskina [1977] 3 All ER 803 ***(refd)***
Associated Newspapers Group Plc. v. Insert Media Ltd. [1985] 2 All ER 420 ***(refd)***
A v. B [1989] 2 Lloyd's Rep. 423 ***(cit)***
The Pertamina [1977] 3 All ER 324 ***(refd)***
Ace King Pte. Ltd. v. Circus Americano Ltd. [1985] 2 MLJ 75 ***(cit)***
Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449 ***(refd)***
Intraco Ltd. v. Notis Shipping Corporation [1981] 2 Lloyd's Rep. 256 ***(cit)***
CBS UK Ltd. v. Lambert [1982] 3 All ER 237 ***(cit)***
Stockler v. Fourways Estates Ltd. [1983] 3 All ER 501 ***(cit)***
Z Ltd. v. A-Z [1982] 1 All ER 556 ***(cit)***
London City Agency (JCD) v. Lee [1969] 3 All ER 1376 ***(cit)***

Legislation referred to:
Supreme Court of Judicature (Consolidation) Act 1925 [UK], s. 45(1)
Civil Law Act (Cap. 43), s. 4(8)

For the plaintiff - K. Anantham; M/s. Skrine & Co.
For the defendant - S. Sagadeva; M/s. Saga & Assocs.

JUDGMENT

Abdul Malik Ishak J:

The defendant was the registered proprietor of two pieces of properties held under Grant 14519, Lot 2659, Mukim Senai-Kulai, Johor Bahru ('Lot 2659') and Grant 18576, Lot 365 in Bandar Kota Tinggi, Johor Bahru ('Lot 365'). Lots 2659 and 365 were charged by the defendant to Arab-Malaysian Merchant Bank Berhad ('AMMB') under one legal charge pursuant to the National Land Code 1965 ('NLC'). On 18 January 1996, AMMB obtained a High Court order for the sale of both these Lots by way of a public auction. Prior to 19 January 1995, the defendant had agreed to sell to the plaintiff Lot 2659 for the purchase consideration of RM3.2 million. However, on 19 January 1995, when the parties were at the office of the plaintiff's previous solicitors, Rozinah Nizaruddin S. Gunapati & Co. for the purpose of executing the sale and purchase agreement ('said agreement'), the defendant had a sudden change of heart and decided that he was not prepared to sign the said agreement as some other party had apparently made him a better offer for Lot 2659. Further negotiations took place between the defendant and the plaintiff's solicitor by the name of Gunapati. It was the latter that advised the plaintiff to pay an additional sum of RM100,000 to the defendant to which

the plaintiff finally agreed. A personal cheque for RM10,000 was then drawn in favour of the defendant with the balance to be paid on the completion date of the said agreement. On 19 January 1995 the parties signed the said agreement. Under the said agreement, the balance of the purchase price shall be paid by the plaintiff to the defendant within three months of the date of the said agreement with an extension of another three months subject to the payment of interest on the balance of the purchase price at the rate of 10% per annum on daily basis. Since Lot 2659 was charged to AMMB, it was the common agreement and understanding of the parties that the balance of the purchase price shall be utilised for the redemption of Lot 2659. This was to enable the defendant to comply with his obligation of transferring an unencumbered title to Lot 2659 to the plaintiff on the completion date. In due course, the plaintiff deposited a sum of RM72,000 to its solicitors Rozinah Nizaruddin S. Gunapati & Co. being the interest payable to the defendant for the three months' extension of the completion date. The completion date was duly extended to 18 July 1995.

On 23 May 1995, Foo & Woon acting on behalf of the defendant wrote to Mohd. Akhir & Partners the solicitors for AMMB informing the latter that the plaintiff as purchaser of Lot 2659 will be ready to pay the balance of the purchase price of RM2,880,000 on or before 18 July 1995. In the same letter, the defendant's solicitors stated that Robert & Stanley Realty Sdn. Bhd. with whom the defendant had obviously entered into an agreement in respect of the sale of Lot 365 would be ready and willing to pay a sum of RM2.3 million to redeem Lot 365 on 6 August 1995. As the total redemption amount to AMMB for these two Lots was in the region of RM4.2 million to RM4.3 million, the defendant had requested AMMB to allow separate redemptions of these two Lots and to fix the redemption sums of Lots 365 and 2659 at RM2.3 million and RM2 million respectively. AMMB's solicitors wrote to the solicitors for the defendant and the plaintiff on 9 June 1995 where it purported to agree to separate redemptions of Lot 2659 and Lot 365 but, in effect, it did not agree to such separate redemptions. It was apparent that AMMB only fixed one redemption sum of RM4,470,244.25 as at 31 May 1995. It was AMMB's stand that the entire sale proceeds of Lot 2659 shall be applied towards part payment of the redemption sum and that the balance of the redemption sum shall be paid from the proceeds of Lot 365. In other words, AMMB shall only release the discharge documents in respect of these two Lots upon receipt of the full redemption sum. The refusal of AMMB to fix a separate redemption sum for Lot 2659 meant that the defendant would be in a position to complete his part of the bargain under the agreement with the plaintiff as AMMB would not discharge its charge over Lot 2659 even upon receipt of the balance of the purchase price in respect of Lot 2659 unless the shortfall was first made good by the defendant from the proceeds he was hoping to

obtain from Robert & Stanley Realty Sdn. Bhd. in respect of Lot 365. In the circumstances and with a view to enable both parties to complete the purchase of Lot 2659 on the extended completion date of 18 July 1995, the plaintiff's solicitors, on 5 July 1995, wrote to the defendant's solicitors Foo & Woon an urgent letter and requested the defendant to make the necessary arrangements for the full settlement of Lot 365 immediately and without further delay. Between 13 July 1995 and 19 July 1995, the plaintiff was informed by their solicitors that the defendant through their solicitors had extended the completion date on or about 7 August 1995 – that was the date where Robert & Stanley Realty Sdn. Bhd. would have paid the sum of RM2.3 million to AMMB in respect of Lot 365.

It was the plaintiff's case that they were ready, willing and able to pay to the defendant the balance of the purchase price on the extended date of 18 July 1995 but, in view of AMMB's refusal to fix a separate redemption sum for Lot 2659 and the defendant himself was in no position to complete the agreement on 18 July 1995 (the balance of the purchase price in regard to Lot 2659 was not sufficient to settle the redemption sum fixed by AMMB in respect of Lots 2659 and 365), the plaintiff did not attend at the office of Rozinah Nizaruddin S. Gunapati & Co. on 18 July 1995. The defendant too did not attend the said office on that day for the completion of Lot 2659.

Undaunted, the plaintiff's solicitors followed up with the defendant's solicitors on 7 August 1995 and requested for the latest development of the matter. In anticipation that the completion date might be on or very soon after 6 August 1995 (on the assumption that Robert & Stanley Realty Sdn. Bhd. would pay RM2.3 million to redeem Lot 365 on 6 August 1995 as they were supposed to do), the plaintiff obtained a bank draft for the balance of that purchase price and transmitted that bank draft dated 19 July 1995 to the defendant's solicitors. Unfortunately, Robert & Stanley Realty Sdn. Bhd. failed to pay RM2.3 million for Lot 365 by the deadline set by the defendant at 12.00 p.m. (noon) on 7 August 1995. This meant that Lot 2659 could not be redeemed simultaneously.

In the meantime the plaintiff was informed by Gunapati of Rozinah Nizaruddin S. Gunapati & Co. that he had spoken to the defendant's solicitor by the name of Woon See Chin on or about 8 August 1995 and the latter had requested for a further extension of two weeks to obtain the instructions of the defendant. Accordingly, the plaintiff was advised by Rozinah Nizaruddin S. Gunapati & Co. to cancel the bank draft for the balance of the purchase price until such time as the defendant could give further instructions on the matter or was in a position to comply with his obligations under he said agreement. Events showed that the defendant did not revert to the plaintiff in regard to the extended completion date. The plaintiff all along was ready, willing and able

to pay the balance of the purchase price for Lot 2659 but was patiently waiting for the defendant to notify them as to whether he has either managed to persuade AMMB to agree to separate redemptions for the two Lots or that the defendant had managed to secure a new purchaser for Lot 365 who had already paid or was ready to pay the purchase price to AMMB. The position was this. As on 8 August 1995 the defendant's solicitors were supposed to revert to the plaintiff or its solicitors with the defendant's further instructions on the matter. Out of the blue and without prior notice to the plaintiff, the defendant by letter dated 10 November 1995 purported to inform the plaintiff that as it had not paid the balance of the purchase price on the extended date of completion the said agreement was to be treated as terminated. The plaintiff took the stand as advised by their solicitors that the purported termination of the said agreement by the defendant was wrongful and without any basis for two reasons. Firstly, the completion date on 18 July 1995 had been extended until such date as the defendant himself was able to give a good, unencumbered title to the plaintiff. Secondly, it was clear that while the plaintiff was, at all material times, ready and willing to pay the balance of the purchase price, the defendant was dragging his feet and was not ready, willing or able to complete the said agreement by giving a good and unencumbered title to the plaintiff. It was for these reasons that the plaintiff was advised by their solicitors not to pay the balance of the purchase price to the defendant unless the defendant himself was ready and willing to perform his obligations under the said agreement.

In due course both parties changed their solicitors, Yee Teck Fah & Co. took over as solicitors for the plaintiff from Rozinah Nizaruddin S. Gunapati & Co. The defendant changed solicitors from Foo & Woon to Saga & Associates. By letter dated 27 December 1995 Yee Teck Fah & Co. wrote to Saga & Associates to convey the message that the plaintiff had not failed to comply with the terms of the said agreement. The defendant's solicitors were further informed that it was the defendant who, at all material times, was unable to deliver title to Lot 2659 to the plaintiff free from all encumbrances notwithstanding that the plaintiff had tendered the full balance of the purchase price. It was the plaintiff's stand that the defendant procrastinated. By the defendant's inaction and his own disability or inability to complete the sale on 18 July 1995 he was said to be estopped and precluded from denying that the completion date had been extended to a date when the defendant himself was able to obtain a separate redemption sum for Lot 2659 from AMMB or for that matter when the defendant was able to successfully complete the sale of Lot 365 first to enable both Lots 2659 and 365 to be redeemed simultaneously. It was said that it was the duty of the defendant to notify the plaintiff as to the extended completion date. These were matters that were said to be within the exclusive knowledge of the defendant himself.

Without wasting precious time, the plaintiff lodged a private caveat on Lot 2659. The defendant by an originating summons No: 24-176-96, sought to remove that private caveat. Various affidavits were filed by the parties. The matter came up before me on 25 April 1996 and 18 May 1996 whereupon the defendant's application for removal of the plaintiff's caveat on Lot 2659 was dismissed with costs.

In the meantime, the plaintiff filed summons for directions which was fixed for hearing on 29 August 1996. On that date Saga & Associates mentioned on behalf of the plaintiff's solicitors in order to obtain appropriate directions for trial. In dismissing the defendant's originating summons No: 24-176-96 the Judge orally directed that the plaintiff's action herein against the defendant for specific performance be fixed for early trial. Sometime on or about 1 August 1996, the plaintiff was served with originating summons No: 24-583-96 filed by AMMB for the removal of the plaintiff's caveat lodged on Lot 2659. Subsequently, the plaintiff was informed by their new solicitors Skrine & Co, that they had been verbally informed by AMMB and AMMB's solicitors Mohd. Akhir & Partners that the defendant had been adjudicated a bankrupt on 28 December 1995 in a bankruptcy petition presented by UMBC Bhd. By letter dated 7 August 1996 to AMMB the plaintiff had through their solicitors Skrine & Co. informed AMMB that in order to safeguard their interest over Lot 2659, the plaintiff was prepared to obtain a transfer of AMMB's charge over Lot 2659 and, towards that end, the plaintiff requested to know the amount which will have to be paid by them to AMMB in order to obtain a transfer of the said charge. Pending a reply from AMMB, the plaintiff through their solicitors Skrine Co, wrote to the Official Assignee in Johor Bahru and notified the latter of the plaintiff's interest as a purchaser of Lot 2659 and requested the Official Assignee to effect a transfer of the defendant's title to Lot 2659 to the plaintiff upon payment of the balance of the purchase price by the plaintiff. It is interesting to note that in that letter, the plaintiff's solicitors further informed the Official Assignee that in the event the balance of the purchase price payable by the plaintiff in respect of Lot 2659 (which was in the region of RM2.97 million) should be insufficient to obtain a discharge of AMMB's charge over Lot 2659, the plaintiff would even be prepared to pay any additional sum to AMMB in order to obtain a discharge of the title to Lot 2659. It was deposed that the plaintiff made personal attempts through the deponent of the affidavit in Encl. 10 one Chai Woon Chee to meet the Official Assignee in Johor Bahru. It was Chai Woon Chee's fellow director and nephew by the name of Chai Kim Loong who met and spoke to the Official Assignee one Rohalim Mat Arshad sometime prior to 29 August 1996. Through the Official Assignee it came to light that the defendant had already repaid his indebtedness to the petitioning creditor UMBC Bhd. and was in the process of applying for rescission and annulment of the adjudicating order and receiving

order made against him on 28 December 1995 in bankruptcy petition No: 29-1200-94. Since AMMB had yet to reply to the plaintiffs letter of 7 August 1996, the plaintiff through their solicitors wrote another letter dated 20 August 1996 to AMMB and requested for the redemption sum in respect of Lot 2659. The plaintiff contended that it had an interest in Lot 2659 and was legally interested in the payment of monies to redeem Lot 2659 and that the plaintiff was ready, willing and able to pay the redemption sum in respect of Lot 2659 in order to obtain a discharge of AMMB's charge over the property. On 21 August 1996, the plaintiff was informed by their solicitors that a fax was received from AMMB's solicitors dated 21 August 1996 which relayed the message that AMMB had decided not to accept the plaintiff's proposals of transferring or assigning AMMB's charge over Lot 2659 to the plaintiff. AMMB made known their stand in a letter dated 26 August 1996 where AMMB's solicitors informed the plaintiff's solicitors that the proper person to tender payment of the redemption sum in respect of Lot 2659 would be the defendant himself as the chargor. It was with this scenario in mind that AMMB was not prepared to disclose the amount of the redemption sum in respect of Lot 2659 to the plaintiff or their solicitors. Even my colleague made a ruling on 29 August 1996 that AMMB's priority as chargee over Lot 2659 took precedence over any interest which the plaintiff has over the said property.

It was deposed that the plaintiff has a strong and valid case against the defendant for specific performance of the said agreement. It was emphasised that I had on 18 May 1996 *vide* originating summons No: 24-176-96 ruled that the plaintiff had a caveatable interest over Lot 2659. It was deposed that it was the intention of the defendant to deprive the plaintiff of their interest in Lot 2659 and to dispose of the property to a third party regardless of the present proceedings for specific performance of the said agreement by the plaintiff against the defendant. It was quite apparent that the defendant had in his affidavit filed in regard to originating summons No: 24-176-96 on 12 March 1996 deposed that he had on 26 February 1996 entered into another sale and purchase agreement of Lot 2659 to S.J. Host Sdn. Bhd. It was deposed that unless this Court were to restrain the defendant from disposing of, transferring, charging or otherwise dealing with the title to Lot 2659 pending the disposal and outcome of the present proceedings, the plaintiff was likely to suffer irreparable loss and damage as it was almost certain that as soon as the plaintiff's caveat over Lot 2659 was removed, the defendant would obtain the rescission and annulment of the adjudicating and receiving orders made against him and thereafter would redeem Lot 2659 with the consent of AMMB in order that the defendant can thereafter sell or transfer Lot 2659 to a third party for a much higher purchase price than that at which he has agreed to sell to the plaintiff. It was further deposed that the market value of Lot 2659 was now in the region of at least RM7 or RM8 million whereas

the defendant had agreed to sell the said property to the plaintiff for a much lower sum of RM3.2 million. The plaintiff then gave their undertaking as to damages. It is trite law that the ability of the plaintiff to honour his undertaking is a material factor in the balance of convenience (*The American Cyanamid* case [1975] 1 All ER 504 at p. 510). The Courts however have been very liberal for it will not deny the plaintiff an interlocutory injunction simply because the plaintiff is of limited financial means (*Allen v. Jambo Holdings Ltd.* [1980] 2 All ER 502).

On these facts as set out in the affidavit of Chai Woon Chee (Encl. 10) that was affirmed on 5 September 1996, I made the following orders on 6 September 1996 as set out in Encl. 11 which was heard *ex parte*:

(1) that the defendant whether by himself or his servants or agents or otherwise howsoever be restrained and an injunction be issued restraining each of them until judgment in this action or until further order from selling, disposing of, charging, transferring or in any way howsoever dealing with all that land held under Lot 2659 registered in the name of the defendant and/or from any monies or purchase price in respect of any purported sale or other dealing with Lot 2659;

(2) that the defendant does, within 14 days from the service of this Order, serve or cause to be served on AMMB of Room 10-2, 10th Floor, Menara Pelangi, Jalan Kuning, Taman Pelangi, 80400 Johor Bahru, Johor, to whom Lot 2659 is charged, a letter stating that, in the event the charge over Lot 2659 should be discharged other than through a public auction sale of Lot 2659 pursuant to the Court order dated 18 January 1996 in originating summons No: 24-938-93 in this Court, and the defendant should be entitled to the return of the document of title to Lot 2659, AMMB should be irrevocably directed and instructed to deposit the document of title to Lot 2659 with the deputy registrar of this Court, to abide by the Order of the Court to be made herein;

(3) that the costs of and incidental to this application be costs in the cause; and

(4) that the plaintiff be at liberty to apply.

An *inter partes* hearing was also ordered on 20 September 1996. On that day at the request of both parties an interim injunction pending the hearing of the *inter partes* was ordered to begin forthwith till 25 October 1996. Both parties too magnanimously agreed that a Registrar's caveat should be entered on Lot 2659 even though the Registrar was not cited as a party (*Cargill v. Bower* [1879] 10 Ch. D 502; *Seet Soh Ngoh v. Ventkateswara Sdn. Bhd.* [1976] 1 MLJ 242; *Palaniappa Chettiar v. Letchumanan Chettiar & Anor.* [1982] 1 MLJ 252; *Development & Commercial Bank Bhd. v. Government*

of Malaysia & Ors. [1989] 3 MLJ 359 and *Boonsom Boonyanut v. Adorna Properties Sdn. Bhd.* [1990] 3 MLJ 444). An order to that effect was accordingly made.

On 25 October 1996, once again both parties agreed that the interim injunction granted by this Court on 20 September 1996 be extended until judgment with liberty to the defendant to apply. Costs were ordered to be costs in the cause.

On 16 December 1996, K. Anantham appeared for the plaintiff in regard to the *ex parte* summons-in-chambers in Encl. 20 supported by an affidavit of Chai Woon Chee that was affirmed on 11 December 1996 as reflected in Encl. 19. K. Anantham informed the Court that after this Court gave the order that was sought for in Encl. 11, Lot 2659 had been sold by auction. Now, Anantham wanted this Court to restrain the defendant from receiving the monies and using it and also to prevent the defendant from transferring the assets. According to Anantham he had informed S. Sagadeva in regard to Encl. 20. It seemed that S. Sagadeva was on leave and he had no objections to the prayers sought for in Encl. 20. With this concession, I granted prayers (1), (2), (3) and (4) of Encl. 20 and these prayers were worded as follows:

(1) that the defendant whether by himself, his servants or agents or otherwise howsoever be restrained until judgment in this action or until further order in this action or until further order for applying for and/or receiving payment of any monies due to him in respect or as a consequence of the sale by auction of all that land held under Lot 2659 by AMMB pursuant to the Order of Court dated 18 January 1996 in originating summons No: 24-938-93 in the Johor Bahru High Court; and

(2) that the defendant whether by himself his servants or agents or otherwise howsoever be restrained until judgment in this action or until further order from disposing of, mortgaging, assigning or transferring, pledging or charging or diminishing in any way howsoever, dealing with any of his assets whether situated within or outside Malaysia including credit balance or balances in any account in his name (whether generally or jointly with any third parties) or in which the defendant has an interest provided that nothing in this Order shall prevent any bank or banks from exercising any right of set-off it may have in respect of facilities afforded by it to the defendant prior to the date of this Order;

(3) that the defendant does within fourteen (14) days from the service of this Order, cause to be sworn and served on the plaintiff's solicitors an affidavit disclosing the nature, location and value of all his assets including assets held by others on behalf and/or on trust for the defendant within or outside Malaysia including but without prejudice to the generality of the foregoing;

(4) the costs of and incidental to this application to be costs in the cause.

The *inter partes* hearing was then fixed on 30 December 1996 with an undertaking by K. Anantham that he would inform S. Sagadeva about the next date of hearing.

On 30 December 1996, S. Sagadeva appeared for the defendant and he mentioned for K. Anantham who acted for the plaintiff. S. Sagadeva sought for another date to argue the *ex parte* Mareva injunction that was granted by this Court as per Encl. 20 on 16 December 1996. S. Sagadeva informed this Court that K. Anantham agreed to an extension of time to enable the defendant to file an affidavit-in-reply. S. Sagadeva also informed this Court that K. Anantham agreed that prayer (3) of Encl. 20 be stayed pending the determination of the *inter partes* hearing. The parties too requested for a hearing of the *inter partes* after 16 January 1997. Orders to that effect were accordingly made. The *inter partes* hearing for Encl. 20 was then fixed on 22 January 1997. Arguments were heard on that date which eventually spilled over to 31 January 1997 and 3 March 1997. Those arguments revolved on the prayers in Encl. 28 which were worded in exactly the same terms as that of Encl. 20.

K. Anantham argued that there was one compelling issue that ought to warrant a trial. That issue centred on the question of: When was the completion date of the said agreement? To recapitulate the facts, it must be remembered that the defendant sold Lot 2659 to the plaintiff and the defendant purported to terminate the said agreement on the ground that the plaintiff had not tendered the balance of the purchase price on the completion date. But the facts revealed that there was no completion date because the solicitors for the defendant repeatedly sought to extend the extension date. Hence, the validity of the termination of the said agreement became an issue. After the purported termination of the said agreement, the defendant sold Lot 2659 to S.J. Host Sdn. Bhd. and thereafter the defendant applied to set aside the private caveat that was lodged by the plaintiff to protect the plaintiff's claim for specific performance. The defendant's application to set aside the private caveat was heard and dismissed with costs on 18 May 1996. To date no appeal was lodged by the defendant.

The plaintiff's concern was in regard to Lot 2659. The plaintiff was interested in restraining the defendant from disposing of, mortgaging, assigning or transferring, pledging or charging or diminishing his assets. In short, the plaintiff was bent on obtaining a Mareva injunction. Sir Robert Megarry V.C.'s definition of a Mareva injunction in Barclay – *Johnson v. Yuill* [1980] 3 All ER 190 was cited with approval in *Prince Abdul Rahman* [1980] 1 WLR 1268 to the effect that:

> ... the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the Court in the action ...

Basically a Mareva injunction is in the nature of an interlocutory order designed to prevent a defendant from negating the effect of a judgment which may be entered against him by preventing him from disposing of his assets before execution on the judgment can be levied. Couched differently, a Mareva injunction essentially restrains a defendant from disposing of, removing or otherwise dissipating his assets. But it does not confer on the plaintiff any security or priority over the defendant's assets. My research shows that the Mareva injunction is a major departure from the traditional common law principle that a person "cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property" (per James LJ in *Robinson v. Pickering* [1881] 16 Ch. D. 660). It was in 1975, that the English Court of Appeal in two prominent cases: *Nippon Yusen Kaisha v. Karageorgis* [1975] 3 All ER 282 and *Mareva Compania Navierra SA v. International Bulkcarriers SA* [1980] 1 All ER 213, effected a radical change in the law when it granted interlocutory injunctions to restrain removal of the defendants' assets from the Court's jurisdiction. It is pertinent to point out that the English Courts derived jurisdiction to grant the injunctions by relying on the statutory provisions contained in s. 45(1) of the UK Supreme Court of Judicature (Consolidation) Act 1925 which enacts that:

> The High Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the Court to be just and convenient so to do.

In Malaysia, the then Federal Court in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 ruled that the High Court has jurisdiction to grant a Mareva injunction in appropriate circumstances by virtue of para. 6 of the Schedule to the Courts of Judicature Act 1964. The decision in *Zainal Abidin (supra)* has been followed dutifully by *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 MLJ 143 and *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor.* [1988] 1 MLJ 97. The majority decision of the then Supreme Court in *Aspatra Sdn. Bhd. (supra)* put an end, finally, on the issue of jurisdiction to grant a Mareva injunction when Mohamed Azmi SCJ (now FCJ) said at p. 100:

> There should be no doubt that the Mareva remedy is here to stay.

Since the Mareva injunction is an ancillary relief, its availability is dependent on there being a pre-existing cause of action. The long arm of Mareva extends to cases where there is a danger that the assets will be dissipated within the Court's jurisdiction as well as cases where there is a danger of removal of

assets out of the jurisdiction: *Prince Abdul Rahman (supra).* In Australia, the Court of Appeal of New South Wales has gone to the extent of holding that the Mareva injunction can be given to prevent dissipation of assets outside the Court's jurisdiction as reflected in *Ballabil Holding v. Hospital Products* [1985] 1 NSWLR 155. It is germane to mention that a Mareva injunction is essentially an *in personam* order. It operates *in rem* only in the sense that anyone once notified of the injunction, including a third party, is bound not to aid in dealings with the assets of the defendant. A Mareva injunction do not create a lien or any proprietary right or any right of that nature. As I said earlier, it gives the plaintiff no security or priority over the assets frozen by the injunction: *Cretanor Maritime Co. Ltd. v. Irish Marine Management* [1978] 3 All ER 164. In the context of the present proceedings it is appropriate to say and I so say without reservations that the Mareva injunction do not affect a third party's right of set-off against the defendant for liabilities incurred prior to the date of the order. Thus, AMMB's rights under the Mareva injunction are not affected and they are not prevented from exercising any right they may have in respect of any facilities granted to the defendant prior to the date of the order if I am so minded to grant the Mareva injunction in favour of the plaintiff: *Oceania Castelana Armadora SA v. Mineral import export, The Theotokos* [1983] 2 All ER 65.

In Singapore, since Mareva injunctions are issued under s. 4(8) of the Civil Law Act (Cap 43), it is the duty of the plaintiff in every case to show that it will be "just and convenient" that the order applied for ought to be made. What is "just and convenient" is obviously a question to be determined on the circumstances of each case.

Reported authorities like *Rasu Maritime SA v. Perusahaan* [1977] 3 All ER 324; *The Third Chandris* case [1979] 2 All ER 972; *The Ninemia* case [1984] 1 All ER 398; *Art Trend Limited v. Blue Dolphin (Pte) Ltd.* [1983] 1 MLJ 25; *Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd. (supra);* and *Creative Furnishing Sdn. Bhd. v. Wong Koi* [1989] 2 MLJ 153 serve as guidelines in that they established that the plaintiffs must essentially show the following elements before Mareva injunctions would be granted:

(1) The plaintiff must have a cause of action which the Court has jurisdiction to hear;

(2) There must be a good arguable case;

(3) There must be some grounds for believing that the defendant has some assets in his ownership or possession within the jurisdiction; and

(4) There must be a real danger that assets will be removed from or dissipated within the jurisdiction.

I will now proceed to examine these four elements separately in the context of the facts to the present proceedings.

Jurisdiction of the Courts to Hear a Substantive Claim

It goes without saying that the plaintiff must have a valid cause of action which the Court has jurisdiction to hear. The Court too must be on the same footing and must be in a position to hear the plaintiff's substantive claim and grant substantial reliefs in the action before it would grant a Mareva injunction (*The Siskina* [1977] 3 All ER 803; and *Associated Newspapers Group Plc. v. Insert Media Ltd.* [1985] 2 All ER 420). The statement of claim in Encl. 2 recited at great length the facts of the case on similar lines with Encl. 10. Anyone reading the statement of claim will at once note the presence of the cause of action founded on the said agreement. The plaintiff's claims were principally hinged on specific performance of the said agreement and damages that flowed under it. When the defendant purportedly terminated the said agreement and sold Lot 2659 to S.J. Host Sdn. Bhd., the plaintiff was perfectly entitled to and was correct in applying for a Mareva relief – a relief that was essentially meant to ensure that the defendant's assets are not dissipated so as to prevent execution on any judgment against him. It is my judgment that the plaintiff has a substantive claim recognised by this Court and, consequently, the Mareva relief sought for the plaintiff was obtainable from this Court. Put bluntly, the plaintiff cannot obtain any remedy from the Malaysian Courts if he does not have a substantive claim recognised by the Malaysian Courts (see an elaboration of this principle in *A v. B* [1989] 2 Lloyd's Rep 423).

A Good Arguable Case

The authorities all show that the plaintiff here need not show that he has a strong case so as to warrant the summary judgment. The plaintiff too need not show that they have a strong *prima facie* case. The *Pertamina* case [1977] 3 All ER 324 at p. 334 lays down the now accepted test of whether the plaintiff has a good arguable case. But it is not easy to define nor elaborate on the meaning behind the words "a good arguable case". However, it is generally sufficient if the plaintiff can show that on the available evidence, there is a fair chance that they will obtain judgment against the defendant. Ultimately, and at the end of the day, it is the Court's discretion to decide, having considered all the evidence before it, whether an injunction is justifiable (The *Ninemia* case *(supra)*; and *Ace King Pte. Ltd. v. Circus Americano Ltd.* [1985] 2 MLJ 75).

It is my judgment that on the facts garnered from the available evidence the plaintiff has an arguable case. *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 449 lays

down the principle that if the vendor commits a breach of the agreement by refusing to transfer the land to the purchaser, the latter may file a suit for specific performance of the agreement. The caveat lodged by the plaintiff over Lot 2659 was a measure adopted by the plaintiff to prevent the defendant from disposing of the property to a third party. That the defendant had the audacity to enter into another sale and purchase agreement of Lot 2659 with S.J. Host Sdn. Bhd. on 26 February 1996 made the whole case arguable. That there was no completion date between the plaintiff and the defendant in regard to the sale and purchase of Lot 2659 simply because the solicitors for the defendant repeatedly sought to extend the extension date – also point to an arguable case.

The Defendant Has Assets Within Jurisdiction

It is generally acceptable and it is the law that there must be some indication that the defendant must have assets within the jurisdiction before the Court will grant a Mareva injunction against the defendant (*Third Chandris Shipping Corp v. Unimarie (supra)* especially at p. 984h; and *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256). Assets have been described to include chattels, land, ships, aircrafts, bank accounts, joint accounts as well as choses in action (*CBS UK Ltd. v. Lambert* [1982] 3 All ER 237; S*tockler v. Fourways Estates Ltd.* [1983] 3 All ER 501; *Allen v. Jambo Holdings Ltd. (supra)*; and *Z Ltd. v. A-Z* [1982] 1 All ER 556). Here, the plaintiff took the trouble of stating the precise nature and whereabouts of the defendant's property within jurisdiction. It is not disputed that there are assets including the proceeds of the auction – all within jurisdiction, in the present case.

A Real Danger of Disposal of Assets

This is the most important element as the prevention of the defeat of a possible judgment is the ultimate aim of the Mareva relief. Once there is evidence that the defendant is actually removing his assets from the jurisdiction in order to preclude the plaintiff from enjoying the fruits of a judgment that the plaintiff is likely to obtain, the Court will readily grant an injunction. It is a correct statement of the law to say that the Court will intervene as long as there is a "real risk that a judgment or award in favour of the plaintiff would remain unsatisfied" (The *Ninemia* case *(supra)*). Thus, a Mareva injunction can even be granted against a local defendant who is not trying to remove his assets out of the jurisdiction provided that it can be shown that there is a real danger that he may dissipate his assets so as to render any judgment against him useless (*Allen v. Jambo Holdings Ltd (supra)*). It is usually very difficult to obtain evidence of actual removal or dissipation of assets and most plaintiffs, correctly advised, will not want to wait until there is actual evidence of such

acts on the part of the defendant before they go to Court. It is because of this that most Mareva applications are made on the premise that it is highly likely that the defendant may deal with his assets to the prejudice of the plaintiff. Case laws have suggested the correct test to apply, and that would be: Whether there are some facts from which the Court, considering the matter in perspective as a prudent sensible commercial man would, can properly infer a danger that the defendant will deal with his assets so that he would have no assets within the jurisdiction to satisfy any judgment debts (*The Third Chandris* case *(supra)* especially at p. 987b).

Having deliberated at great length, I took into account the following factors to arrive at the conclusion that there was a real danger that assets will be dissipated:

(1) The circumstances under which the plaintiff's claim arose. One must not forget that the defendant had purported to sell to the plaintiff a piece of property which was charged without first ascertaining that the purchase price would be sufficient to discharge the charge. The defendant too did not take stock of the situation and decide whether he was in a position or being prepared to pay his own monies to redeem the charge bearing in mind that the purchase price was insufficient to discharge the charge. To put it bluntly, the defendant's past conduct or the nature of the events that led to the action against the defendant are germane considerations (*Art Trend Ltd. v. Blue Dolphin (Pte) Ltd. (supra)*).

(2) The manner in which the defendant wrongfully terminated the said agreement was relevant. To date, from the various affidavits filed, supportive of the defendant, there was nothing tangible to specifically show the "extended completion date".

(3) The defendant's credit history raised pertinent questions about his integrity and honesty. There was affidavit evidence to show that the defendant was actually adjudicated a bankrupt. The defendant claimed that the adjudicating order and the receiving order were made in his absence yet the defendant saw it fit and did not say that he had no knowledge of the judgment debt or of the commencement of the bankruptcy proceedings. K. Anantham submitted, and I certainly agree, that a man of integrity would not wait until after he was adjudicated a bankrupt before paying his undisputed debt.

(4) The defendant said that he had properties under his name and he wanted to redeem his properties.

From these set of facts, the following pertinent questions arose:

(a) What guarantee would there be that the defendant would not enter into sham deals in respect of those other properties?

(b) What guarantee would there be that the defendant would not sell those properties to shell companies at ridiculous prices in order to put those properties out of the reach of the plaintiff?

Events have showed that the defendant sold Lot 2659 to S.J. Host Sdn. Bhd. a RM2 company, to frustrate and defeat the plaintiff's interest in that property.

(5) It was argued that the defendant wanted to utilise the surplus auction proceeds to pay his legitimate debts. This argument cannot hold water and cannot stop this Court from granting a Mareva injunction. It must be stressed that a Mareva injunction is not intended to preclude the payment of a legitimate debt. A defendant or an affected third party can apply to Court for a variation or a discharge of a Mareva injunction. In urgent cases the defendant can apply *ex parte* for variation or discharge of a Mareva injunction; though in practice an *inter partes* hearing will usually be required (*London City Agency (JCD) v. Lee* [1969] 3 All ER 1376). Thus, if the defendant here was interested in paying a legitimate debt after this Court ordered a Mareva injunction, the defendant was free to apply to this Court for a variation of that Mareva injunction. A variation of the Mareva injunction by the defendant at a later date would afford this Court the chance to ascertain whether the defendant was genuinely interested in paying his debt or whether he wanted to remove or hide his assets from the plaintiff's reach.

The defendant here should not worry unduly. The law affords equal protection to him. The defendant can apply, at any time, to discharge the Mareva injunction. The defendant can do this on the grounds that one or more of the essential elements of a Mareva injunction have not been satisfied. If the defendant can successfully show that the Court has no jurisdiction to try the action or that the plaintiff does not have a good arguable claim, the Mareva injunction will certainly be discharged (*The Siskina (supra)*). Again if the defendant can satisfy the Court that there is no sufficient risk of dissipation of assets, the injunction may also be discharged (*Art Trend Limited v. Blue Dolphin (Pte) Ltd. (supra)*; *Creative Furnishing Sdn. Bhd. v. Wong Koi (supra)*; and *The Ninemia* case *(supra)*). It is correct to say that an application to discharge a Mareva injunction is by way of a rehearing and, consequently, parties can and should put in the necessary fresh evidence to support their contentions.

S. Sagadeva argued that there must be a real risk that the defendant might remove the assets and that the Mareva injunction cannot be used to freeze the assets. Reliance was placed on the case of *Barclay-Johnson v. Yuill (supra)*, where Sir Robert Megarry V.C. said at p. 195 in regard to the requirements of a Mareva injunction in the following words:

> One is that it must appear that there is a danger of default if the assets are removed from the jurisdiction.
>
> Second, the plaintiff must establish his claim with sufficient particularity, and show a good arguable case, though he need not demonstrate that his case is strong enough to entitle him to judgment.
>
> Third, the case must be one in which, on weighing the considerations for and against the grant of an injunction, the balance of convenience is in favour of granting it.

I entirely agree with the sentiments expressed by Sir Robert Megarry V.C. in the *Barclay-Johnson's* case *(supra)*. The balance of convenience in the present case tilted in favour of the plaintiff for the simple reason that the parties entered into the said agreement in regard to Lot 2659 where the completion date was totally unknown. If the Mareva injunction was not granted or renewed the plaintiff has every thing to lose. There was a risk that the judgment, if obtained, will not be satisfied.

An argument was advanced that there was no frank disclosure on the plaintiff's part. It was untrue when the plaintiff said that the defendant was a Singapore citizen. To right the wrong the plaintiff filed an affidavit in Encl. 42 through Chai Woon Chee and in para. 13 thereof an apology was extended to this Court to say that the plaintiff had erred and that the defendant was in fact a Malaysian citizen. This was vehemently objected to by S. Sagadeva and he submitted that the material time for frank disclosure would be at the time when the *ex parte* Mareva injunction was applied for. K. Anantham rightly pointed out that within a short span of time, the defendant's citizenship could not easily be ascertained. It is pertinent to point out that there was suppression of material facts in *Creative Furnishing Sdn. Bhd. v. Wong Koi (supra)* whereas in the present case the parties had, on 20 September 1996, agreed that the interim injunction pending the hearing of the *inter partes* should be ordered by this Court. Indeed errors were made by the plaintiff but these errors were not material as envisaged in *Creative Furnishing Sdn. Bhd. v. Wong Koi (supra)*.

Inferences can be drawn from the available evidence that there was a danger that the defendant may dispose of his assets so as to dissipate it before judgment. A real risk, or at least a risk, that the defendant will dissipate his assets with the object of putting them out of the plaintiff's reach would be

sufficient. K. Anantham rightly applied for a Mareva injunction for he knew that "the whole point of the Mareva injunction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction" (per Mustill J in *The Third Chandris Shipping Corporation v. Unimarine SA (supra)*).

For the reasons adumbrated above, Encl. 28 (for the renewal of the Mareva injunction that was granted earlier) was allowed by me.

Reported by WA Sharif